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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/995,358	11/26/2001	Jules Zecchino	2870/566	2755
7590 01/30/2004			EXAMINER	
KAREN A. LOWNEY, ESQ. ESTEE LAUDER COMPANIES 125 PINELAWN ROAD MELVILLE, NY 11747			FUBARA, BLESSING M	
			ART UNIT	PAPER NUMBER
			1615	

DATE MAILED: 01/30/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/995,358

Applicant(s)

JULES ZECCHINO ET AL

Examiner

Blessing M. Fubara

Art Unit

1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 01 November 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-21 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

DETAILED ACTION

Examiner acknowledges receipt of amendment and affidavit filed 11/01/03.

Claim Rejections - 35 USC § 102

1. The rejection of claims 1-18 under 35 U.S.C. 102(b) as being anticipated by Wheeler (WO 97/32559) is withdrawn because applicants amended claim 1 such that the composition of the amended claim 1 now contains polymeric sulfonic acid as opposed to a composition that is gelled by a polymeric sulfonic acid.

Claim Rejections - 35 USC § 103

2. Claims 19-21 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Wheeler (97/32559) in view of Clariant product. Claims 1-18 are now included in this rejection in light of the amendment of the composition of claim 1 to contain polymeric sulfonic acid.
 - a) Applicants agree that Wheeler recommends the use of Carbomer as a gelling agent and not polymeric sulfonic acid; that none of the references indicate the unexpected superiority of the polymeric sulfonic acid. Furthermore, applicants state that the declaration of James T. Harrison and Michelle Matathia Jacobs demonstrate that at pH of less than 7, "carbomers as well as several of the other types of gallants recommended by Wheeler do not provide a non-homogenous unstable product" and that when a "polymer sulfonic acid is substituted in the same compositions, a smooth, homogenous composition is obtained." Applicants further state that the declarations "unequivocally demonstrate

the superiority of the polymeric sulfonic acid in stably gelling the biliquid foam dispersions at pHs below 7.”

3. Applicants' arguments filed 11/01/03 and summarized above have been fully considered but they are not persuasive.

The amended claim recites a pH of less than about 7 and this pH is less than 7; also, Wheeler teaches pH of 6.5 in example 3 and this pH is less than 7. Wheeler teaches Carbomer as a gellant but the secondary reference, Clariant product brochure, teaches polymeric sulfonic acid as gelling agent for systems such as the one disclosed by Wheeler and one gelling agent can be substituted for another and expect the gelling of the aqueous solution to take place. The declaration is not commensurate with the scope of the claims. Since the secondary reference teaches polymeric acid as a gellant, and since one gellant can be substituted for another, prediction or lack of prediction of the superiority of the polymeric sulfonic acid over the carbomer would not distinguish over the composition formed by substituting polymer sulfonic acid for carbomer since the same effect is obtained.

b) Applicants state that, in Wheeler when large amounts of surfactant are used, the pH is adjusted to 7; further applicants state that in the absence of large amounts of surfactants, a biliquid foam in an aqueous dispersion having a pH of less than 7 would not be predicted to be stable.

4. Applicants' arguments filed 11/01/03 have been fully considered but they are not persuasive.

The instant claims do not exclude surfactants from the composition. The composition comprising large amounts of surfactants also contains gelling agents. Although, applicants contend that in the case when the composition has large amounts of surfactants, the pH is adjusted to 7, it is respectfully submitted that less than about pH 7 is not different than pH 7 and the secondary reference is relied upon for a gelling agent and one gelling agent can be used in place of another; applicants have not shown that large amounts of surfactants interferes with either the polymeric sulfonic acid gelling agent or prevents the gelling process.

5. Applicants' amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Blessing M. Fubara whose telephone number is (571) 242-0594. The examiner can normally be reached on 7 a.m. to 3:30 p.m. (Monday to Friday).

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thurman K. Page can be reached on (571) 272-0602. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1234.

Blessing Fubara
Patent Examiner
Tech. Center

